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Note: Anti-Discrimination Legislation in Housing

NOTES AND COMMENTS

NOTE: ANTI-DISCRIMINATION LEGISLATION IN HOUSING

> Housing is the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay. . . .
>
> Much of the housing market is closed . . . for reasons unrelated to . . . personal worth or ability to pay. . . .[1]

The problem of discrimination in housing is one that has moral, socio-economic and legal overtones. Discrimination in its objectional sense is inconsistent with a belief in a Diety who has created men with equal rights and dignity.[2] However, because all men differ in personal characteristics, it would not be immoral to distinguish and to choose on this basis.[3] But a choice based on blind adherence to racial or religious prejudice would be morally improper. When one does discriminate with respect to housing, he not only acts immorally but also contributes to the continuation of certain social evils, which result when a minority group cannot obtain adequate housing.

> Stability of family life, the rearing of children . . . all depend on the quality and the availability of homes. When housing is not available or when available only in deteriorated, overcrowded conditions, family life becomes difficult. . . . Juvenile delinquency and family instability will persist as long as families are forced, because of discriminatory housing practices, to crowd into whatever limited housing is available.[4]

Discrimination in housing also affects the relations of the United States with the uncommitted nations of the world.[5] From a legal standpoint though, one's right to dispose of property to persons of his own choice, should be preserved.

In the promulgation of statutes that seek to eradicate discrimination, legislatures have seen fit to divide housing facilities into three categories.[6] *Public Housing* is

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[1] *Hearings on Housing in Washington Before the United States Comm'n on Civil Rights* 4 (1962).

[2] Gleason, *The Immorality of Segregation*, in A CATHOLIC CASE AGAINST SEGREGATION 3 (1961).

[3] MCMANUS, STUDIES IN RACE RELATIONS 69 (1961).

[4] *Hearings on Housing in Washington Before the United States Comm'n on Civil Rights, supra* note 1, at 7.

[5] O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, —, 365 P.2d 1, 3 (1961).

[6] It should be remembered that not every jurisdiction has enacted laws that prohibit discrimination in all or any of the below-mentioned categories of housing. THE INTERGROUP RELATIONS SERVICE AND THE OFFICE OF THE GENERAL COUNSEL, STATE STATUTES AND LOCAL ORDINANCES AND RESOLUTIONS PROHIBITING DISCRIMINATION IN HOUSING AND URBAN RENEWAL OPERATIONS 3 (1961).

financed and administered either wholly or partially by federal, state or local authorities, or some combination thereof. *Publicly Assisted Housing,* on the other hand, includes privately owned housing aided by a loan, the repayment of which is guaranteed by an agency of the federal, state, or local government. This category includes both urban renewal projects and Federal Housing Association developments. Public Assistance may also take the form of a tax exemption or the use of the governmental power of condemnation to assemble a parcel of land which is then sold to a private developer. Finally, *Private Housing* consists of housing facilities that are financed and owned completely by private persons who have not received assistance from any government agency.[7] Since discrimination by a governmental agency in the area of *public housing* is unconstitutional by virtue of the fifth[8] and fourteenth amendments,[9] it is the purpose of this note to discuss some of the more recent legal developments that have arisen with respect to *Publicly Assisted* and *Private Housing.*

History

Traditionally, one of the most effective methods of discrimination by a private home owner was the use of a restrictive covenant running with the land. Also, one might covenant with his neighbors not to sell or rent his home to a particular group. Either of these procedures would have been upheld by the courts.[10] In 1948, the Supreme Court in *Shelley v. Kramer*[11] ruled that the specific enforcement of a racially restrictive covenant by a state court constituted a violation of the "equal protection" clause of the fourteenth amendment. This holding was subsequently extended in two directions. In *Hurd v. Hodge,*[12] the Court decided that the Civil Rights Act[13] would prevent the federal courts of Washington, D. C., from enforcing a similar covenant; in *Barrows v. Jackson,*[14] it was held that the fourteenth amendment would also prevent a state board from awarding damages for the breach of such a covenant. Since the rationale of the fourteenth amendment argument binds state courts, they are reluctant to exclude evidence of discrimination. Thus, in *Abstract Inv. Co. v. Hutchinson,*[15] the plaintiff landlord sought to evict a Negro tenant. The defendant affirmatively alleged that the eviction was sought only because of his color. The California Court held that evidence tending to show discrimination was admissible. For if the defendant's allegations were correct, judicial enforcement of the eviction would result in a violation of the defendant's rights under the fourteenth amendment.

In the area of publicly assisted housing prior to *Shelley,* the Federal Housing Ad-

[7] *Id.* at iv.

[8] See Hurd v. Hodge, 334 U.S. 24 (1948).

[9] See Shelley v. Kramer, 334 U.S. 1 (1948); Barrows v. Jackson, 346 U.S. 249, *rehearing denied,* 346 U.S. 841 (1953).

[10] Dury v. Neely, 69 N.Y.S.2d 677 (Sup. Ct. 1942); Ridgeway v. Cockburn, 163 Misc. 511, 296 N.Y. Supp. 936 (Sup. Ct. 1937).

[11] 334 U.S. 1 (1948). In *Shelley* the Court held that the enforcement of a restrictive covenant by a state court would violate the defendant's right to equal protection under the fourteenth amendment. In addition, where a covenantor limits the use of property by means of a possibility of reverter for a breach of a restriction a court will not recognize it. Capitol Fed. Sav. & Loan Ass'n v. Smith, — Cal. —, 316 P.2d 252 (1957).

[12] 334 U.S. 24 (1948).

[13] 14 Stat. 27 (1866), 42 U.S.C. § 1982 (1958).

[14] 346 U.S. 249, *rehearing denied,* 346 U.S. 841 (1953).

[15] 7 RACE REL. L. REP. 509 (1962).

ministration would not guarantee loans that would enable minority groups to enter white communities.[16] While the Supreme Court decision has caused the F.H.A. to change its policy, Congress, on the other hand, has indicated its reluctance to incorporate anti-discrimination provisions in proposed amendments to housing legislation as recently as 1949,[17] 1953,[18] and 1954.[19] To fill this void left by the federal government's inactivity, many states have acted on their own with respect to discrimination in publicly assisted housing.

Publicly Assisted Housing

Two means have been utilized by jurisdictions that have sought to eliminate discrimination in this area. The first is direct statutory prohibition while the second originates from the decisions of courts in the absence of statutes. In this second category, the courts generally theorize that, by virtue of federal or state governmental assistance, the builder is no longer acting individually. He is acting rather as a quasi-governmental agency. Therefore, every discriminatory practice would violate either the fifth or fourteenth amendments.

As far as the first method is concerned, three states have recently upheld the constitutionality of their publicly assisted housing statutes. In *New York State Comm'n Against Discrimination* v. *Pelham Hall Apts., Inc.*,[20] the defendant refused to lease one of its apartments to a negro on the basis of the latter's race and color. The defendant's actions were found to violate what is now the New York Executive Law[21] since the defendant's financing of the project was guaranteed by the F.H.A. The defendant attacked the constitutionality of the statute, alleging that he had a right to choose the individual with whom he wished to contract. The court announced that the statute was a valid exercise of the police power of the state. In addition, the court indicated that the legislature may proceed step by step in promoting the public welfare. Thus, even though certain areas of housing remained unaffected by this statute, the defendant had not been denied equal protection under the law. A similar rationale has been employed in upholding publicly assisted housing statutes in New Jersey[22] and California.[23] The New Jersey court was even willing to find "public assistance" despite the fact that the F.H.A. guarantee had not been advanced at the time of the discrimination.[24]

In contrast to this line of cases, a Washington court, in *O'Meara* v. *Washington State Bd. Against Discrimination*[25] found a publicly assisted housing statute[26] to be unconstitutional. The court reasoned that although the law could prohibit discrimination by certain groups, there had to be a rational basis for selecting one group rather than another. In the court's opinion, applying the act solely to owners of

[16] Lehman, *Discrimination in F.H.A. Guaranteed Home Financing*, 40 CHI. B. RECORD 375, 376-77 (1958).
[17] 95 CONG. REC. 4860, 8658 (1949).
[18] 99 CONG. REC. 1429 (1953).
[19] 100 CONG. REC. 4488 (1954).
[20] 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958).
[21] N.Y. EXECUTIVE LAW §§ 296(3), 292(11).
[22] Levitt & Sons, Inc. v. State Div. Against Discrimination, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960).
[23] Burks v. Poppy Constr. Co., 22 Cal. Rep. 609, 370 P.2d 313 (1962).
[24] Levitt & Sons, Inc. v. State Div. Against Discrimination, *supra* note 22, at 182.
[25] 58 Wash. 2d 793, 365 P.2d 1 (1961).
[26] WASH. REV. CODE § 49.60.030 (1957).

publicly assisted housing was unconstitutional because this group was no more likely to discriminate than other homeowners. Since there was no rational basis for singling them out for anti-discrimination regulation, "this act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do."[27]

As indicated above, the second method by which states have combatted discrimination in publicly assisted housing involves the theory that the government is acting through the individual. In *Ming* v. *Horgon,*[28] the defendant claimed that the fact that his building project was benefited through F.H.A. guarantees was not sufficient ground to warrant a finding that he was a governmental agency. Thus the defendant believed that his right to contract with people of his own choice remained inviolate. The court found that the benefit of F.H.A. assistance transformed the defendant into a governmental agency whose right to contract was restricted by the fifth amendment, and consequently he could not discriminate on the basis of color.

In *Dorsey* v. *Stuyvesant Town Corp.*[29] a private corporation received public assistance in the form of state tax exemption for twenty-five years, and condemnation proceedings which made adjacent lots available to the defendant as a unified area. However, the court ruled that this aid did not change the private character of the undertaking, and therefore, the corporation was not enjoined from denying accommodations on the basis of race or color. Although the *Ming* decision has been codified by statute,[30] and the *Dorsey* holding overruled by statute,[31] the rationale employed in both might still be utilized in a jurisdiction in which there is no such statutory protection.

Private Housing

While there is no common-law prohibition against discriminating in the disposition of private housing, some jurisdictions have proscribed it in connection with certain private housing facilities. These statutes generally provide that there shall be no discrimination in connection with the sale or rental of multiple dwellings or of contiguously located housing.[32] However, because a multiple dwelling is usually defined as a building with facilities for three or more families, [33] there remains a significant area of private housing that is not subject to statutory regulation.

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[27] O'Meara v. Washington State Bd. Against Discrimination, 58 Wash. 2d 793, —, 365 P.2d 1, 5 (1961).

[28] 3 RACE REL. L. REP. 693 (Cal. 1958).

[29] 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950).

[30] CAL. HEALTH & SAFETY CODE § 35710 (3)(a), (c).

[31] N.Y. EXECUTIVE LAW § 292(c)(1),(3).

[32] COLO. REV. STAT. ANN. § 69-7-3 (Supp. 1960) (includes all private housing, except those premises used by the owner as the household of his family and not more than four boarders or lodgers); CONN. GEN. STAT. REV. § 53-35 (Supp. 1961) (includes any private housing accommodation or building lot on which a housing accommodation will be constructed which is or is to be one of three or more accommodations located on a single parcel or parcels of land that are contiguous); MASS. ANN. LAWS. ch. 151B, § 1 (Supp. 1961) (includes a multiple dwelling used as the residence or home of three or more families as well as contiguously located housing of ten or more housing accommodations); N.Y. EXECUTIVE LAW §§ 292(12), 296(5)(a) (includes a multiple dwelling used as a residence or home of three or more families, not including the owner's family, and contiguously located housing of ten or more housing accommodations).

[33] *Ibid.*

Although the Supreme Court has not as yet passed upon the constitutionality of these laws, there appear to be several arguments that can be made against their validity. At the outset, it should be noted that the builder finances his project without resort to public funds. Consequently, it cannot be argued that the state is permitting the owner to discriminate or is sanctioning discrimination. It is also abortive to suggest that since the public is contributing to the project, that the public is entitled to live in it. We are left then with an individual, who, through this own initiative has built homes and who desires to dispose of them as advantageously as possible. If he has decided that it is economically unfeasible to contract with a person, and is subsequently compelled by statute to contract, it could be argued that the statute has deprived him of his property and liberty without due process of law. Moreover, since the contract clause of the Constitution prohibits a state from impairing contractual obligations, the spirit of that clause might prevent the state from creating such an obligation.

However, a recent Massachusetts case[34] upheld the constitutionality of a private housing statute. The statute involved made it unlawful to discriminate in the sale or renting of a multiple dwelling which was defined as a "dwelling which is usually occupied for permanent resident purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other."[35] It was alleged that the defendant refused to rent a unit in his 120 unit apartment building because of the complainant's color. The defendant had not received any type of public assistance. Thus he contended that the statute was unconstitutional because it impaired his freedom to contract and his inalienable right to possess property.[36] The court upheld the statute on the ground that it was a valid and reasonable exercise of the state's police power. The court reasoned that the constitutionality of publicly assisted housing statutes had been previously upheld, and the lack of such assistance was not itself a strong enough ground for distinguishing the private housing statute from the publicly assisted. One writer believes that this case illustrates a trend in the opinion writing in this area.[37] He thinks that courts will no longer base their decisions upon precedents alone, nor "upon the mathematical application of neatly defined principles" but rather upon "the power of government to effectuate impelling public policies."[38]

Enforcement

While some statutes exist to prohibit discrimination in housing, the real problem is that of enforcement. "[A]ssistance is given the evader by the difficulty of proof. It is difficult to prove that a prospective tenant was rejected for racial reasons."[39]

[34] Massachusetts Comm'n Against Discrimination v. Colangelo, — Mass. —, 182 N.E.2d 595 (1962); for a declaratory judgment to the same effect, see Martin v. City of New York, 22 Misc. 2d 389, 201 N.Y.S.2d 111 (Sup. Ct. 1960).

[35] MASS. ANN. LAWS ch. 151B, § 1(11) (Supp. 1961).

[36] Massachusetts Comm'n Against Discrimination v. Colangelo, *supra* note 34, at —, 182 N.E.2d at 599.

[37] Kozol, *The Massachusetts Fair Housing Practices Law*, 47 MASS. L. Q. 295 (1962).

[38] *Id.* at 305.

[39] Martin v. City of New York, *supra* note 34, at 391, 201 N.Y.S.2d at 112.

Such statutes are usually enforced by commissions created by the statutes themselves, by the Attorney General, or by the courts. Before examining these methods of enforcement, it should be noted that President Kennedy has issued an executive order[40] to prevent discrimination "in the sale, leasing, rental" of property that is financed either by direct federal loans or by federally insured loans. With respect to its enforcement, the order provides that any violator will be given the opportunity to change his behavior before any economic sanctions, *i.e.,* withdrawal of the loan or any other assistance, are invoked.

Some jurisdictions have created Commissions Against Discrimination whose purpose is the enforcement of the anti-discrimination statutes.[41] While these bodies have the practical result of saving the complainant time and money in registration of his complaint and investigation, there is some doubt whether they can provide the effective remedy that the complainant seeks.[42] Since it usually takes at least three months for the commission to come to a final decision,[43] the defendant can defeat the complainant's remedy by renting or selling to another before the commission has reached any conclusion. In *Reed* v. *Zier,*[44] the plaintiff sought to enjoin the defendant from leasing any four room apartment within the defendant's development. The plaintiff wanted the injunction to run until the New York State Commission for Human Rights had decided whether or not the defendant had discriminated on the basis of color when it refused to rent to the plaintiff. The court refused to issue it, stating that the jurisdiction of the Commission was exclusive and that the plaintiff could not resort to the court until the Commission had decided the question of discrimination.

While some anti-discrimination statutes specifically empower the Attorney General to file complaints if there has been discrimination,[45] Attorney Generals are alert to enforce the state's policy against discrimination, whether or not the statutes authorize them to take the initiative. For example, the Attorney General of Massachusetts has ruled that a real estate office is a place of public accommodation[46] and therefore a broker may not refuse his services to or in any way discriminate against any person because of that person's race, creed or color.

When discrimination in housing violates a sharply defined public policy, courts are not reluctant to grant relief to an aggrieved party where the alleged discrimination is not covered by the housing statute. In California there are no statutory sanctions against discrimination in private housing. However, the courts have seized upon the *Unruh Civil Rights Act,*[47] which provides that all persons are entitled to full and equal accommodation in *all business*

[40] Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).
[41] MASS. ANN. LAWS ch. 6, § 56 (1961); N.Y. EXECUTIVE LAW § 293.
[42] See, *e.g.,* MASS. ANN. LAWS ch. 151B, § 3 (1957).
[43] Note, *The Right To Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation,* 74 HARV. L. REV. 526, 557 (1961).
[44] 229 N.Y.S.2d 582 (Sup. Ct. 1962).
[45] MASS. ANN. LAWS ch. 151B, § 5 (1958); N.Y. EXECUTIVE LAW § 297.
[46] 5 RACE REL. L. REP. 253 (1960). Similarly, the Chairman of Connecticut's Civil Rights Commission has requested all newspapers to refrain from advertising real estate when the advertisement implies that Negroes will not be eligible. 6 RACE REL. L. REP. 345 (1961).
[47] CAL. CIV. CODE § 51 (Supp. 1962).

establishments, to prevent discrimination by interpreting the meaning of business establishments in a broad manner. Thus, it has been held that the following transactions involve business establishments: the sale of a private home by a real estate broker;[48] a real estate transaction made by the owner.[49]

Conclusion

While the law has recently begun to recognize that discrimination in housing is an evil to be eradicated, the enforcement of such a policy, as indicated above, may sometimes frustrate the efforts to accomplish this. For example, in *Redd* v. *Zier*[50] a finding by the Commission for Human Rights that the defendant did discriminate, was of no value to the plaintiff. During the course of the fact finding the defendant was free to lease to another. Because it narrowly interpreted Section 300 of the New York Executive Law as granting *exclusive* jurisdiction to the Commission, the court refused to issue a preliminary injunction. However, it could have justified the granting of such an injunction by a broad construction of the first sentence of section 300 which provides: "The provision of this article shall be construed liberally for the accomplishment of the purposes thereof."[51] If the injunction were phrased to permit the defendant to lease all apartments but the one in question, it would have subjected him to no economic hardship.

In conclusion it can fairly be stated that statutes prohibiting discrimination in housing are justified on both constitutional and moral grounds. But the passage of statutes alone will not solve the problem. Because of the real conflict between personal and property rights which this area presents, there will still remain a difficult problem of enforcement.

[48] Vargas v. Hampson, 20 Cal. Rep. 618, 370 P.2d 322 (1962); *accord,* Lee v. O'Hara, 20 Cal. Rep. 617, 370 P.2d 321 (1962).

[49] Burks v. Poppy Constr. Co., 20 Cal. Rep. 609, 370 P.2d 313 (1962).

[50] 229 N.Y.S.2d 582 (Sup. Ct. 1962).

[51] N.Y. EXECUTIVE LAW § 300.